Legal Update

July 11, 2014

Absent additional factors supporting a belief that the defendants possessed a criminal amount of marijuana under Massachusetts law, the police were not justified in searching the vehicle in an effort to enforce Federal law prohibiting possession of small amounts of marijuana!

Commonwealth v. Craan, SJC-11436, (2014):

Background: In June 2011, the state police held a sobriety checkpoint in Dorchester. When the trooper stopped the defendant's vehicle and the defendant rolled down the window, the trooper smelled an odor of unburnt marijuana. The trooper directed the defendant to pull into the screening area and asked whether the defendant had any marijuana in the vehicle. The defendant told the officer that he "had just smoked some weed." The trooper informed the defendant that he smelled unburnt not burnt marijuana. The defendant opened the glove compartment to reveal a "small plastic bag" containing a substance that the trooper believed to be marijuana. The trooper ordered both the defendant and the passenger out of the vehicle and conducted a patfrisk. No contraband was found on the defendant or passenger. The trooper searched the defendant's vehicle and recovered, a device used for grinding marijuana, three Ecstasy pills, "some marijuana" and plastic baggies that appeared to contain burnt marijuana residue. The trooper also searched the trunk, where he found rounds of .38 caliber ammunition. The trooper did not observe the defendant to be impaired and he allowed the defendant to drive the vehicle away without being asked to submit to any field sobriety tests. Two months after the

defendant was stopped, a criminal complaint charging the defendant with various drug- and firearms-related offenses was issued. The defendant filed a motion to suppress which was initially denied but reversed after the defendant filed motion to reconsider following the ***Cruz*** case. ***Commonwealth v. Cruz***, 459 Mass. 459 (2011). The Commonwealth filed an interlocutory appeal and the SJC transferred the case.

Conclusion: The SJC affirmed the allowance of the motion to suppress and held that the 2008 ballot initiative decriminalizing possession of one ounce or less of marijuana limits police authority to conduct warrantless searches of vehicles, even on the basis of the odor of unburnt marijuana. The Commonwealth contends that aside from the odor of unburnt marijuana, there were additional justifications as to why the search of the vehicle was valid. The SJC examined each argument listed below:

1. Was the search valid under the search incident to arrest?
2. Was the trooper justified in searching the vehicle as a preventative measure to stop the defendant from smoking marijuana while driving?
3. Were the police justified in searching the vehicle under the automobile exception for a violation of Federal Law?

1st Issue: Was the search valid under the search incident to arrest?

The SJC concluded this argument was not valid because the trooper did not arrest the defendant nor the passenger after he found marijuana inside the vehicle. A search incident to arrest permits officers to search a vehicle when an arrest has taken place, in order to "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" or "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." See ***Commonwealth v. Santiago***, 410 Mass. 737, 743 (1991). "Where no arrest is underway, the rationales underlying the exception do not apply with equal force." See ***Commonwealth v. Skea,*** 18 Mass. App. Ct. 685, 690 (1984). Since there was no arrest, the search of the defendant's vehicle was not valid under this exception. Additionally, there was no evidence to suggest that the trooper had probable cause to arrest the defendant for OUI drugs. The trooper did not administer any field sobriety tests and the defendant was permitted to drive his vehicle away. ***Commonwealth v. Daniel***, 464 Mass. 746, 756-757 (2013). Without evidence that the defendant was operating a motor vehicle while under the influence there was no probable cause to arrest the defendant and searching the vehicle was not justified.

2nd Issue: Was the trooper justified in searching the vehicle as a preventative measure to stop the defendant from smoking marijuana while driving?

The Commonwealth contends that the trooper was "duty-bound" to search the defendant's vehicle to ensure that he would not "smoke additional marijuana while driving." The Commonwealth argues that the mere possibility that more marijuana was present in the vehicle provided the trooper with probable cause to believe that the defendant had committed, or was committing, a crime, namely possession of more than one ounce of marijuana. See ***Commonwealth v. Daniel, supra*** at 751-752 (defendant's surrender of two small bags of marijuana did not give rise to probable cause to search vehicle). Despite the Commonwealth's argument that the defendant could have smoked more if the trooper had not intervened, the SJC disagreed. The trooper testified that he smelled unburnt marijuana not burnt which would suggest the defendant had not been smoking while

driving. The SJC was not persuaded by the Commonwealth's suggestion that the search was permissible owing to the trooper's duty to ensure the safety of the roadways and to prevent the mere potential that the defendant could smoke marijuana while driving.

3rd Issue: Were the police justified in searching the vehicle for a violation of Federal Law?

The SJC examined the state law that was passed from the 2008 ballot initiative that decriminalized possession of less than ounce of marijuana. The Commonwealth's argument asks the SJC to circumvent the "clear intent" of the voters who enacted the 2008 initiative, which we identified in ***Commonwealth v. Cruz***, 459 Mass. 459, 464-465, 472 (2011), and to overrule the holding of that case. When the 2008 initiative passed, police conduct with regard to marijuana offenses was limited because the initiative reclassified possession of one ounce or less of marijuana as a civil violation. Since the 2008 initiative decriminalized possession of one ounce or less of marijuana under State law, and removed police authority to arrest individuals for civil violations, see G. L. c. 94C, § 32N, it must also be read as curtailing police authority to enforce the Federal prohibition of possession of small amounts of marijuana. "Any contrary interpretation would clearly contravene the people's intent, to which we must give effect." See ***Commonwealth v. Cruz***, at 470-471.

The Commonwealth acknowledges that after the 2008 initiative passed, state and local police lacked authority to make arrests under Federal law for possessing small amounts of marijuana, but maintains that police may investigate possible violations of Federal statutes and turn over any evidence obtained to Federal authorities. However, the Federal government has issued memorandum within the past few years indicating that its priorities in prosecuting marijuana- related offenses are focused on "preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels" and "preventing violence and the use of firearms in the cultivation and distribution of marijuana." See J.M. Cole, Deputy Attorney General of the United States, ***Guidance Regarding Marijuana Enforcement*** (Aug. 29, 2013) (Cole); D.W. Ogden, Deputy Attorney General of the United States, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009). The SJC further held that where "State law expressly has decriminalized certain conduct, there is no extant joint investigation, and the Federal government has indicated that it will not prosecute certain conduct, the fact that such conduct is technically subject to a Federal prohibition does not provide an independent justification for a warrantless search."

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.